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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 728

MAY DEPARTMENT STORES COMPANY, a New York Corporation, and JERRY GODDARD, *Petitioners*,

v.

TAKASHI KATAOKA, by his Guardian *ad Litem*, TSUTOMU KATAOKA, and TSUTOMU KATAOKA, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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v.

TAKASHI KATAOKA, by his Guardian *ad Litem*, TSUTOMU KATAOKA, and TSUTOMU KATAOKA, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States.

Your petitioners, MAY DEPARTMENT STORES COMPANY, a New York corporation, and JERRY GODDARD (sued herein as Jerry Goddord), respectfully file and submit this as their Petition for a Writ of Certiorari to review a decision and judgment of the United States Circuit Court of Appeals for the Ninth Circuit.

Said Circuit Court of Appeals on November 18, 1940, reversed a decision and judgment of the District Court of the United States for the Southern District of California, Central Division, in favor of petitioners and against respondents herein, for lack of jurisdiction on the part of the said District Court to entertain the action. (R. 178) The decision is reported in 115 Fed. (2d) 521. Mandate has been stayed by proper order (R. 179) and the cause is now filed and docketed herein for decision. The decisions of the District Court in this case are reported in 28 Supp. 3, and 30 F. Supp. 346.

SUMMARY STATEMENT OF MATTER INVOLVED.

This is an action for damages arising out of alleged injuries to Takashi Kataoka, an infant, as a result of his catching his hand in an escalator in the store of the May Company in Los Angeles, California. Suit was instituted in the District Court of the United States for the Southern District of California, Central Division.

The complaint contains three separate and distinct alleged causes of action.

The first of these causes of action (R. 1 to 6) alleges that the minor plaintiff therein was a resident and citizen of the State of California; that the defendant May Department Stores Company (hereinafter referred to as "May Company") was a resident and citizen of the State of New York; that the defendant Jerry Goddord was an employee of that defendant, acting within the scope and course of his employment, and that the amount in controversy, exclusive of costs and interests, is over the sum of three thousand dollars. (R. 2 to 3)

There is *no* allegation as to the residence or citizenship of the defendant Goddard.

It is alleged that the May Company maintained, managed and operated a department store building, furniture, fixtures and equipment. (R. 3)

It is *not* alleged that the defendant Goddard maintained or managed or operated or had any control whatsoever over the store building, furniture, fixtures or equipment.

It is also alleged that the minor plaintiff and his mother were customers and invitees of the defendant May Company. (R. 3)

It is *not* alleged that the plaintiff or his mother were customers or invitees of the defendant Goddard.

It is then alleged that amongst the fixtures and equipment installed in the building managed and operated *by the defendant May Company* was an escalator. (R. 3)

It is *not* alleged that this escalator was managed or operated or in any wise under the control of the defendant Goddard or that he had anything to do with the escalator.

It is then alleged that where the escalator merges into the floor of the building there is a narrow metal plate which runs the whole width of the step, and that protruding from said metal plate are metal fingers about two inches apart and each about one inch long, so that there is a small opening or aperture about a quarter of an inch deep between the plate and the steps and running the whole length of the step. It is alleged that this aperture was not covered but was left open. (R. 4)

It is then alleged that the minor plaintiff in some way got his hand caught in the escalator while his mother was talking with the defendant Goddard concerning an exchange of a previous purchase. (R. 4)

It is then alleged that the defendant Goddard attempted to remove the minor plaintiff's hand, stopped the escalator and finally reversed it, without summoning anyone having knowledge of the mechanics of the escalator. (R. 5)

It is *not* alleged that any of said acts upon the part of Goddard were in any wise improper or negligent.

It is then alleged that the step of the escalator, in coming back, severed the third and fourth fingers of the hand of the minor plaintiff. (R. 5)

It is then specifically alleged "that the loss of the fingers was proximately caused by the negligence and carelessness of the defendants, and each of them, in failing to cover the said aperture or opening, and by allowing it to remain unguarded"; that the defendants and each of them knew or should have known that children would visit the store, ride on the escalator, and that the escalator, and particularly the opening between the steps and the floor, was alluring to them and would be likely to attract them and induce them to put their hands therein. (R. 5-6)

Finally, it is alleged "that by reason of the negligence and carelessness of the defendants, and each of them, *as aforesaid,* and as a proximate consequence thereof," the plaintiff suffered certain damages. (Italics ours.) (R. 6)

There is *no* allegation of any duty upon the part of the defendant Goddard to cover the said aperture or opening or to prevent it remaining unguarded. There is *no* allegation that he had any right or authority to have done so.

This first cause of action does not refer to or attempt to incorporate any portion of the remaining causes of action. There is a separate prayer for damages in the sum of fifteen thousand dollars upon this cause of action. (R. 8)

Then follows a "separate, distinct and second cause of action." (R. 6-7) This cause of action incorporates all of the allegations of the first cause of action down to but not including the allegations of negligence and proximate cause.

In this second cause of action the injuries to the minor plaintiff are alleged to have been caused by negligence in operating, conducting and supervising the escalator and by negligence upon the part of the defendant Goddard in attempting to remove the hand of the minor plaintiff and in his failure to summon an expert to release that plaintiff's hand. (R. 6-7)

There is, however, still no allegation that the defendant Goddard had any participation in or control of the operation, conducting or supervising of the escalator.

There is a separate prayer for damages in the sum of fifteen thousand dollars on this cause of action. (R. 8)

Then follows a third "separate and distinct cause of action." (R. 7-9) This cause of action incorporates the allegations of the first two causes of action and then alleges damages to the plaintiff father for medical, hospital and nursing services. There is a separate prayer for damages on this cause of action in the sum of $992.18. (R. 8)

The answer of the defendants admitted by failure to deny the residence and citizenship of the minor plaintiff and of the defendant May Company; that the amount in controversy, exclusive of costs and interest, is over the sum of three thousand dollars. The answer also admitted by failure to deny that the defendant May Company maintained the store in Los Angeles and its furniture, fixtures and equipment, including the escalator, and that the defendant Jerry Goddard was its employee and acting within the scope and course of his employment. (R. 9 to 13)

The answer admitted the operation of the escalator by the defendant May Company, and that the hand of the minor plaintiff got caught therein betwen the step and the metal plate. It denied negligence upon the part of the defendants, or either of them, or that any negligence upon their part caused injury or damages to the plaintiffs. (R. 10-11)

The answer denied the allegations as to the acts of the defendant Goddard, except that it admitted that he attempted to remove the plaintiff's hand and slightly reversed the escalator to enable him to do so. (R. 11)

The case went to trial before a jury. Plaintiffs introduced no evidence as to how the accident occurred nor as to the construction, operation, maintenance or supervision of the escalator, nor that the defendant Goddard did not have a knowledge of the mechanics of the escalator, nor that his conduct was in any wise negligent or improper. (R. 47 to 87)

Upon the conclusion of the plaintiff's case, the defendants, severally, moved to dismiss the action on the ground that the evidence failed to show any negligence on the part of the defendants, or either of them or that any negligence on the part of the defendants, or either of them, proximately or at all contributed to the happening of the accident. These motions were granted. (R. 87) Thereafter judgment was entered for the defendants. (R. 18)

Plaintiffs served a notice of intention to move for new trial. (R. 34, 38) While said motion was pending, plaintiffs filed a notice of motion to dismiss for lack of jurisdiction. (R. 40) The latter motion was denied (R. 37) and thereafter the motion for new trial was also denied. (R. 39)

Plaintiffs thereupon filed a notice of appeal from the judgment in said action, without specifying therein whether the appeal was from the whole of said judgment or from a specified part thereof. (R. 41)

In their Opening Brief in this appeal, appellants stated that they "have not assigned as error the action of the District Court in denying the motion (for judgment on the ground of no jurisdiction) as appellants * * * believe the ends of justice would be served if this case be decided by this court on the merits". In neither their Opening Brief nor in their Reply Brief nor upon oral argument before the Circuit Court of Appeals did appellants advance any argument, reason or authority why the judgment *in favor of the defendant Goddard* should not be affirmed if the District Court had jurisdiction of the case. (R. 95 to 152; see especially R. 142)

QUESTIONS PRESENTED.

Where a complaint is filed in the Federal Court and contains a separable controversy between a resident plaintiff and non-resident defendant, has the Federal Court jurisdiction of that controversy?

Especially does it not have such jurisdiction where said separable controversy is set forth in a separate and distinct cause of action, not referring to or adopting any allegations of any other cause of action and not containing any allegation of any duty upon the part of the resident defendant nor of the violation of any such duty nor of any other negligence upon the part of said resident defendant?

Is the Federal Court deprived of jurisdiction as to such separable controversy by the addition to the complaint of a separate cause of action between residents of the same state?

Is the jurisdiction of a District Court as to all causes of action as extensive where the complaint is originaly filed in that Court as it would have been had the same complaint been filed in the State Court and then removed to the District Court?

Upon the dismissal of a case as to the only resident defendant, has the Federal Court jurisdiction to render judgment between the resident plaintiff and the non-resident defendant?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The decision of the Circuit Court of Appeals in holding that the District Court did not have jurisdiction of said first cause of action is in conflict with the decisions of the Circuit Courts of Appeal of other jurisdictions, to wit:

> *Nichols* v. *Chesapeake, etc. Ry. Co.* (C. C. A. 6), 195 Fed. 913; *Jacobson* v. *Chicago, etc. Ry Co.* (C. C. A. 8), 66 Fed. (2d) 688; *Jackson* v. *Chicago, etc. Ry. Co.* (C. C. A. 8), 178 Fed. 432; *Young* v. *Southern Pacific Co.* (C. C. A. 2), 15 Fed. (2d) 280; *Mecom* v. *Fitzsimmons Drilling Co.* (C. C. A. 3), 47 Fed. (2d) 28; (Reversed on other grounds, 284 U. S. 183; 76 L. E. 233).

2. The decision of the Circuit Court of Appeals in holding that the District Court did not have jurisdiction of the sec-

ond cause of action in plaintiffs' complaint is in conflict with the above decisions of other Circuit Courts of Appeal.

3. In holding that the District Court did not have jurisdiction of either said first or second causes of action, the Circuit Court of Appeals has decided a Federal question probably in conflict with the applicable decisions of this Court, namely:

> *Barney* v. *Latham*, 103 U. S. 205; 26 L. E. 514 (Involving an accounting, title to personal property and conveyance of real property); *Geer* v. *Mathieson*, 190 U. S. 428, 47 L. E. 1122 (Rescission for fraud); *Connell* v. *Smiley*, 156 U. S. 335; 39 L. E. 443 (Quiet title); *Pullman Co.* v. *Jenkins*, 305 U. S. 534; 83 L. E. 334 (Tort action); *Wecker* v. *National Enameling & Stamping Co.*, 204 U. S. 176; 51 L. E. 430; *Wilson* v. *Republic Iron & Steel Co.*, 257 U. S. 93; 66 L. E. 144.

4. The decision of the Circuit Court of Appeals in holding that the District Court did not have jurisdiction of the entire action is in conflict with the decisions of other Circuit Courts of Appeal, namely:

> *Jacobson* v. *Chicago, etc. Ry. Co.* (C. C. A. 8), 66 Fed. (2d) 688, *supra; Mecom* v. *Fitzsimmons Drilling Co.* (C. C. A. 3), 47 Fed. (2d) 28; (Reversed on other grounds, 284 U. S. 183; 76 L. E. 233); *supra.*

5. In holding that the District Court did not have jurisdiction of the entire action, the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

> *Barney* v. *Latham*, 103 U. S. 205; 26 L. E. 514, *supra; Geer* v. *Mathieson*, 190 U. S. 428; 47 L. E. 1122, *supra; Connell* v. *Smiley*, 156 U. S. 335; 39 L. E. 443, *supra.*

6. In holding that the joinder of a resident defendant in the action deprived the District Court of jurisdiction to determine a controversy to which that resident defendant was not an indispensable party, the Circuit Court of Appeals has

decided a Federal question in a way probably in conflict with applicable decisions of this Court.

Boon's Heirs v. *Chiles*, 8 Pet. (U. S.) 532; 8 L. E. 1034 (Suit to compel conveyance of property); *Cameron* v. *McRoberts*, 3 Wheat. (U. S.) 591; 4 L. E. 467 (Suit in equity).

7. The decision of the Circuit Court of Appeals in holding that the District Court did not have jurisdiction to render a judgment between the resident plaintiff and the nonresident defendant after the dismissal of the case as to the resident defendant is in conflict with the prior decision of the same Circuit, which decision has been necessarily affirmed, though without specific mention thereof, by this Court in the case of *Western Union Telegraph Co.* v. *Nester*, 106 Fed. (2d) 587; same case in this Court, 309 U. S. 582; 84 L. E. 960.

8. In so holding, the present decision of the Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts of Appeal, namely:

Jennings v. U. S. (C. C. A. 8), 264 Fed. 399; *Jackson* v. *Jackson* (C. C. A. 4), 175 Fed. 710; *Silver King* v. *Silver King* (C. C. A. 8), 204 Fed. 166; *Drumright* v. *Texas*, etc. (C. C. A. 5), 16 Fed. (2d) 657.

9. In so holding, the Circuit Court of Appeals has decided in this case a question involving Federal law in a way probably in conflict with applicable decisions of this Court, namely:

Connolly v. *Taylor*, 2 Pet. 556; 7. L. E. 518; *Vattier* v. *Hinde*, 7 Pet. 252; 8 L. E. 675.

10. The Circuit Court of Appeals has decided an important question of Federal law in conflict with decisions of this Court in that it has, in effect, held that in a tort action instituted in a District Court the joinder of other causes of action therewith deprives that District Court of jurisdiction even over a separable controversy therein be-

tween a resident plaintiff and a non-resident defendant, to which controversy the resident defendant is not even a proper party, much less an indispensable party.

Your petitioners present herewith as part of this Petition a Brief setting forth more fully their views upon the questions involved, and also a Transcript of the record of the Circuit Court of Appeals.

WHEREFORE, your petitioners respectfully pray that a Writ of Certiorari may be issued out of and under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete Transcript of the record and all proceedings in said Circuit Court of Appeals in said case therein entitled "Takashi Kataoka, by His Guardian ad Litem Tsutomu Kataoka, and Tsutomu Kataoka, Appellants, vs. The May Department Stores Company, a New York Corporation, and Jerry Goddord, Appellees", No. 9479 in said Court, to the end that said case may be reviewed and determined by this Court, and that the said judgment of the Circuit Court of Appeals in said case may be reviewed by this Honorable Court, and that your petitioners may have such other and further relief or remedy in the premises as to this Honorable Court may seem meet and just.

MAY DEPARTMENT STORES COMPANY,
a New York corporation,

JERRY GODDARD,
Petitioners.

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